IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANKLIN PRESCRIPTIONS, INC.,	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 01-145**
v.	:	
	:	
THE NEW YORK TIMES CO.,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **August 5, 2004**

On January 10, 2001, Plaintiff Franklin Prescriptions, Inc. ("Franklin") initiated the instant defamation action against Defendant The New York Times Company (the "Times"), alleging that the Times had defamed Franklin in an article published on October 25, 2000. After more than three years of contentious litigation, including Motions to Dismiss and for Summary Judgment, the case went to trial before a jury in March 2004. On March 22, 2004, after a week-long trial, the jury found that the article in question was defamatory toward Franklin but that Franklin had not suffered any harm as a result of the defamation. Accordingly, judgment was entered in favor of the Times. Plaintiff filed a Motion for a Partial New Trial or in the Alternative for a Complete New Trial. For the reasons set forth below, Plaintiff's Motion is denied.

I. FACTUAL BACKGROUND

In setting forth the following factual background, the Court draws all reasonable inferences in favor of Defendant, the verdict winner.[1]

[1] Cf. Blum v. Witco Chem. Corp., 829 F.2d 367, 372 (3d Cir. 1987) ("Because a jury determined the issue, our scope of review is limited to examining whether there is sufficient evidence to support the verdict, drawing all reasonable inferences in favor of the verdict winner.")

In existence since 1969, Franklin is a small, locally-owned pharmacy located in Philadelphia, Pennsylvania. With the advent of fertility treatments for women who have difficulty conceiving children, Franklin developed a specialty in the area of fertility medications. Franklin has an information-only website on the Internet that allows potential customers to view Franklin's offerings. However, customers cannot utilize this website to order or purchase prescription drugs online; nor can customers contact Franklin via electronic mail. Franklin accepts orders only via post-mail, telephone or telefax, and only with a doctor's prescription.

The Times is a national newspaper published in New York. On October 25, 2000, the Times published an article entitled, "A Web Bazaar Turns into a Pharmaceutical Free For All" (the "Article"). The Article discussed the risks and benefits of purchasing fertility drugs over the Internet. Although the text of the Article does not mention Franklin, the Article was accompanied by an edited version of Franklin's "web-grab."[2] The web-grab is juxtaposed with a side-bar labeled "Safety Tips for Buying E-Medicines," where the Article's author warns readers, inter alia, to "[a]void sites that fail or refuse to provide a United States address and phone number." The web-grab as seen in the Article did not include Franklin's address and telephone number.[3]

At trial, Franklin did not attempt to show that it suffered economic damages as a result of the Article. In fact, the Times presented evidence that Franklin's sales had actually increased in each of the months and years since the publication of the Article. Instead, Franklin sought to prove that its reputation had been harmed by showing 1) that the number of visitors to its

[2] A "web-grab" is a term used for a printout of a website for publication in a newspaper as a photograph.

[3] For a more detailed summary of the contents of the article and ensuing correction, see this Court's prior opinion at 267 F. Supp. 2d 425.

website had dropped, 2) that it had suffered a decrease in customers outside of the Delaware Valley Region, and 3) that it had suffered a decrease in overnight shipping. Franklin did not present the testimony of any medical professionals or customers who had read the Article, and thus presented no direct evidence that any of them had a diminished view of Franklin's reputation as a result of the Article. In addition, the Times deposed each of the physicians whose patients Franklin contended stopped ordering medications from Franklin after publication of the Article; none of these physicians had read or heard about the Article.

The jury found that although the Article contained false and defamatory implications about Franklin, Franklin did not suffer actual harm that was substantially caused by the Article.[4]

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[4] The verdict sheet contained the following questions:

> 1. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that the October 25, 2000 New York Times article entitled "A Web Bazaar Turns Into A Pharmaceutical Free-for-All" contained a defamatory implication(s) about Franklin?
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> 2. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that readers understood the defamatory implication(s) of the article?
>
> 3. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that readers understood that the defamatory implication(s) applied to Plaintiff?
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> 4. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that the defamatory implication(s) was/were substantially false?
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> 5. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that The New York Times acted intentionally, recklessly or negligently when it published the defamatory implication(s) in the article?
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> 6. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that Franklin suffered actual harm that was substantially caused by the article?
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> 7. What dollar amount of damages would compensate Franklin Prescriptions, Inc. for this actual harm?
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> 8. Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that The New York Times published the defamatory implication(s) in the

Accordingly, the Court entered judgment in favor of the Times.

II. ISSUES RAISED

Plaintiff contends that a new trial or partial new trial is warranted because the Court erred by not instructing the jury on presumed damages and defamation per se. Because Plaintiff's argument for a new trial is based upon the Court's jury instructions, it is necessary to explain the procedure the Court used for developing those instructions.

First, prior to trial, both parties filed proposed jury instructions and jury interrogatories with the Court along with pretrial memoranda and motions in limine.[5] Then, after each party had presented its evidence to the jury, but before closing arguments, the Court held several conferences, both on and off the record, with counsel for both parties, during which the Court attempted to fashion a set of jury instructions and jury interrogatories that would be mutually acceptable to the parties. The first of these conferences took place off the record in chambers on March 18, 2004. Because the parties were unable to agree on appropriate jury instructions, upon suggestion of Plaintiff's counsel, the conference concluded with an agreement that the Court would

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> article with a bad motive or reckless indifference to the interests of Franklin?
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> 9. Did Franklin Prescriptions, Inc. satisfy its burden of proving by clear and convincing evidence that The New York Times published the defamatory implication(s) in the article intentionally or with reckless disregard for its falsity?

The jury answered "Yes" to the first five questions and "No" to the sixth question. Because the jury did not find that Franklin suffered any harm, it did not have to answer questions seven to nine.

[5] Defendant filed a Motion in Limine seeking to preclude all of Plaintiff's damages evidence. In its response to that Motion, Plaintiff made no mention of presumed damages, arguing only that the law did not require proof of economic loss. In addition, Plaintiff added emphasis to the following quote from Brinich v. Jencka, 757 A.2d 388, 297 (Pa. Super. Ct. 2000): "a defendant which publishes a statement which can be considered slander per se is liable for ***the proven, actual harm*** the publication causes." See Pl.'s Mem. of Law in Opp. to Def.'s Mot. in Limine to Preclude Pl.'s Proposed Damages Claim and Evidence [Doc. #66] at 4 (emphasis in original). The Court denied Defendant's Motion.

draft a set of instructions that the parties could review and object to on the record. Any matters discussed and/or resolved by agreement of the parties or by ruling of the Court were routinely placed on the record at the Court's next session.

The following morning, in the courtroom and on the record, the Court distributed a draft set of jury instructions to counsel.[6] The Court did not include instructions on presumed damages[7] or defamation per se in this draft, finding such instructions inapplicable under Pennsylvania law.[8] After giving the parties time to review the draft, the Court heard their objections out of the presence of the jury at a hearing that lasted approximately two hours. The Court spent the majority of the hearing addressing Defendant's objections to the instructions. Plaintiff opposed many of Defendant's proposed changes, arguing, inter alia, that Defendant wanted to make changes

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[6] At the outset of this hearing, the Court stated, "I have put together what I think are pretty simplified versions of both of your [proposed instructions]. And it is what [Plaintiff's counsel] asked me to do last night." 3/19/04 N.T. at 5:23-6:2.

[7] Plaintiff's proposed instruction on presumed damages charged as follows:

> If you find that the defendant acted recklessly in publishing the false and defamatory communication, you may presume that the plaintiff suffered injury to its reputation. This means you need not have proof that the plaintiff suffered reputational harm in order to award damages for such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.
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> In determining the amount of an award for such presumed injury to the plaintiff's reputation, you may consider the character and previous general standing and reputation of the plaintiff in its community. You may also consider the character of the defamatory communication that the defendant published, its area of dissemination, and the extent and duration of the publication. You may also take into account the defendant's unsuccessful assertion of the substantial truth of the defamatory communications as a matter likely to affect the plaintiff's reputation. You may also consider what probable effect the defendant's conduct had on the plaintiff's trade, business, or profession, and the harm that may have been sustained by the plaintiff as a result of that conduct.

[8] The Court also distributed drafts of the verdict sheet that was to be submitted to the jury. As with the instructions, this verdict sheet made no mention of presumed damages or defamation per se. Plaintiff did not object to the lack of an interrogatory on presumed damages at the hearing and does not contend that any errors on the verdict sheet entitle it to a new trial.

for its benefit to what were a "fair and reasonable and clean set of instructions."[9] For its part, Plaintiff initially made only two objections: 1) regarding a change in the instruction that Plaintiff must show that the newspaper article was published "of and concerning" Plaintiff; and 2) regarding the general instruction about compensatory damages.[10] In addition, near the conclusion of the hearing, Plaintiff made an additional objection regarding the lack of an instruction on defamation per se, which the Court overruled. Significantly, Plaintiff's counsel specifically sought to "preserve the record" on this objection.[11]

On March 22, 2004, before closing arguments, the Court distributed a new draft of its jury instructions that incorporated some of the parties' requested changes. When the Court asked the parties if there was anything left to address, Plaintiff's counsel responded in the negative. Counsel then delivered their closing arguments. Upon completion of closing arguments, the Court distributed copies of the verdict sheet to the jury and then instructed the jury. During these instructions, the Court did not mention presumed damages or defamation per se. Instead, the Court instructed the jury to award damages to compensate Plaintiff for actual harm suffered if the jury found that Plaintiff had established the essential elements of defamation:

> Now, if plaintiff has established the essential elements of plaintiff's claim as explained in these instructions, plaintiff is entitled then to compensatory damages. You will then award plaintiff such amount as you find will fairly and adequately compensate plaintiff for losses suffered. Only damages that are the direct and natural result of the alleged libel may be recovered as compensatory damages. Plaintiff is entitled to be fairly and adequately compensated for all harm it suffered as a result of the false and defamatory communication published by the defendant. The injuries for which you may

[9] 3/19/04 N.T. at 64:7-16.

[10] Id. at 36-39.

[11] Id. at 78-79.

> compensate the plaintiff by an award of damages against the defendant include the actual harm to the plaintiff's reputation that you find resulted from the defendant's conduct and any other special injuries that you find the plaintiff suffered as a result of the defendant's act.
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> If you find that plaintiff has established the essential elements of the defense [sic], but has failed to prove actual damages, you may award a nominal sum, such as one dollar, or any other nominal amount you choose.
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> The purpose of the law of damages is to award as far as possible just and fair compensation for the loss, if any occurred, which resulted from the defendant's violation of the plaintiff's rights. If you find that the defendant is liable for defamation, as I have explained it to you, then you must award the plaintiff sufficient damages to compensate it for any injury proximately caused by the defendant's conduct. These are known as compensatory damages. Compensatory damages seek to make the plaintiff whole, that is, to compensate plaintiff for the damage that plaintiff claims it has suffered.
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> And I remind you that [you] may award compensatory damages only for injuries, if any, that plaintiff proved were proximately caused by the defendant's allegedly wrongful conduct. The compensatory damages you award must be fair and reasonable, neither inadequate nor excessive. You should only award damages for those injuries that you find plaintiff has actually suffered or which plaintiff is reasonably likely to suffer in the future. In awarding compensatory damages, if you decide to do so, you should use common sense. Although it may be difficult, you should do your best to compute these damages and avoid simply guessing at an amount that would compensate plaintiff. However, you should keep in mind that the law does not require a plaintiff to prove its losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.
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> In sum, you should use your sound discretion in fixing an award of damages drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence.[12]

At approximately 1:00 p.m., the Court sent the jury to begin its deliberations. At approximately 4:50 p.m., the jury read its verdict to the Court, responding affirmatively to the first five questions on the verdict sheet, thereby finding that Plaintiff had proven all of the essential

[12] 3/22/04 N.T. at 25:8-27:7

elements of defamation. On the sixth question, which asked, "Did Franklin Prescriptions, Inc. satisfy its burden of proving by a preponderance of the evidence that Franklin suffered actual harm that was substantially caused by the article?," the jury answered "No." Accordingly, the Court dismissed the jury and entered judgment in favor of Defendant. Plaintiff then timely filed the instant motion, contending that the Court erred by failing to instruct the jury on the law regarding presumed damages and defamation per se.

III. STANDARD OF REVIEW

"A new trial may be granted to all or any of the parties and on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[13] A court should grant a new trial "to prevent a miscarriage of justice only when the jury's 'verdict is contrary to the great weight of the evidence,' or when a 'court commits an error of law which prejudices a substantial right of a party.'"[14] With regard to an erroneous jury instruction, "a new trial may be granted . . . if the 'instruction was capable of confusing and thereby misleading the jury,' or if the jury instruction contained an error that was 'so prejudicial that denial of a new trial would be inconsistent with substantial justice.'"[15]

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[13] Fed. R. Civ. Proc. 59(a).

[14] Ellis v. Nat'l R.R. Passenger Corp., No. Civ.A.02-8059, 2004 U.S. Dist. LEXIS 10207, at *3-4 (E.D. Pa. June 3, 2004) (quoting Roebuck v. Drexel Univ., 852 F.2d 715, 736 (3d Cir. 1988) and Paul Morelli Design, Inc. v. Tiffany & Co., 200 F. Supp. 2d 482, 484 (E.D. Pa. 2002), respectively).

[15] Environ Prods., Inc. v. Furon Co., Inc., No. Civ.A.96-2451, 1998 U.S. Dist. LEXIS 6467, at *3-4 (E.D. Pa. May 1, 1998) (quoting Cooper Distrib. Co. v. Amana Refrigeration, Inc., 63 F.3d 262, 276 (3d Cir. 1995) and Finch v. Hercules, Inc., 941 F. Supp. 1395, 1413-14 (D. Del. 1996), respectively).

IV. DISCUSSION

A. The Omission of an Instruction on Presumed Damages

The Court instructed the jury to award damages to compensate Plaintiff for actual harm suffered if the jury found that Plaintiff had established the essential elements of defamation.[16] The jury found that Franklin did not suffer any actual harm or losses as a result of the Article. Plaintiff now contends for the first time that the Court erred by failing to instruct the jury on the law of presumed damages. Plaintiff's argument fails because: 1) Plaintiff did not properly object to the Court's instructions during trial; and 2) Plaintiff was not entitled to an instruction on presumed damages under Pennsylvania law.

1. Waiver of Objections to Lack of Jury Instruction on Presumed Damages

Defendant contends that Plaintiff waived its right to assign error to the lack of an instruction on presumed damages because Plaintiff did not properly object during the trial. Federal Rule of Civil Procedure 51(c) states that "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for

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[16] The elements of a cause of action for defamation are codified at 42 Pa. Cons. Stat. Ann. § 8343(a):

> Burden of plaintiff – In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.

See also Synygy, Inc. v. Scott-Levin, Inc., 51 F. Supp. 2d 570, 579 (E.D. Pa. 1999), aff'd, 229 F.3d 1139 (3d Cir. 2002) (Table); Walker v. Grand Cent. Sanitation, Inc., 634 A.2d 237, 242 (Pa. Super. Ct. 1993); Agriss v. Roadway Express, Inc., 483 A.2d 456, 461 (Pa. Super. Ct. 1984). However, as discussed in more detail below a plaintiff need not prove special harm when the defamation is per se.

the objection." However, "Rule 51 . . . must be read with Rule 46, which provides that 'it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor. . . .'"[17] In any event, a party may not assign error to the Court's failure to give an instruction unless "that party made a proper request under Rule 51(a),[18] and–unless the court made a definitive ruling on the record rejecting the request–also made a proper objection under Rule 51(c)."[19] The purpose of Rule 51 "'is to afford the trial judge an opportunity to correct the error in his charge before the jury retires to consider its verdict' and to lessen the burden on appellate courts by diminishing the number of rulings at the trial which they may be called upon to review."[20]

Plaintiff responds that it preserved its objection on the presumed damages issue because it submitted a proposed written charge on presumed damages which, according to Plaintiff, was addressed and denied by the Court in its March 18, 2004 conference in chambers. Plaintiff's recollection of the March 18, 2004 conference is inaccurate. This conference began late in the afternoon after a full day of trial. The Court addressed several of Plaintiff's proposed instructions, including its proposed instruction on defamation per se, but as the conference stretched well into the evening with little agreement between the parties, the Court terminated the conference before addressing Plaintiff's presumed damages instruction. Regardless, even if the Court had addressed

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[17] Bowley v. Stotler & Co., 751 F.2d 641, 647 (3d Cir. 1985).

[18] Fed. R. Civ. P. 51(a) provides, in relevant part: "[a] party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests."

[19] Fed. R. Civ. P. 51(d).

[20] McAdam v. Dean Witter Reynolds, Inc., 896 F.2d 750, 769 n.29 (3d Cir. 1990) (quoting Porter v. Am. Export Lines, Inc., 387 F.2d 409, 412 (3d Cir. 1968)).

Plaintiff's proposed instruction at the March 18, 2004 conference, Plaintiff's objection was not preserved because that conference was off the record.

The submission of a proposed instruction, without more, is insufficient to preserve an objection. Here, Plaintiff had three opportunities to object on the record to the lack of a presumed damages instruction. First, at the March 19, 2004 conference, the Court distributed a draft of its instructions and asked the parties to review it before entertaining objections. Plaintiff's counsel reviewed the draft and made three specific objections, including an objection to the absence of a defamation per se instruction specifically to "preserve the record" on that objection. However, Plaintiff never mentioned the absence of a presumed damages instruction. On the other hand, Defendant made a plethora of objections and was primarily responsible for this conference's two-plus hour duration. At one point, Defendant's persistent objections caused Plaintiff's counsel to remark out of frustration that Defendant wanted to make changes for its benefit to what were a "fair and reasonable and clean set of instructions." The Court gave Plaintiff a second opportunity to object on March 22, 2004 before counsel delivered closing arguments, and Plaintiff raised no objections. Finally, the Court gave Plaintiff yet another opportunity to object after the instructions were read to the jury, and again Plaintiff chose not to object.[21]

By failing to object at any point on (or off) the record to the absence of a presumed damages instruction, Plaintiff has waived this issue. The case relied upon by Plaintiff, Smith v. Borough of Wilkinsburg, 147 F.3d 272 (3d Cir. 1998), is factually distinct. In Smith, the plaintiff submitted a proposed instruction and objected to the omission of the proposed instruction on the

[21] 3/22/04 N.T. at 31-32

record at an in camera charge conference.[22] Because the district court explicitly denied the plaintiff's request, the Third Circuit held that "the district court was fully apprised of Smith's position, and it would serve no purpose to require counsel to have formally reasserted the objection after the charge had been given to the jury."[23] Here, unlike in Smith, Plaintiff never objected, either on the record or in chambers, to the absence of a presumed damages instruction. Further, Plaintiff's claim that it did not raise such an objection on the record because "the Court made it abundantly clear that it did not wish to rehash issues that had already been raised"[24] is inconsistent with the fact that Plaintiff specifically sought to preserve on the record its objection relating to defamation per se, an instruction that had been discussed and rejected by the Court at the March 18, 2004 conference in chambers.

Plaintiff's argument is further weakened by the fact that it never raised an objection to the absence of a jury interrogatory related to presumed damages in the verdict sheet submitted to the jury.[25] Although, Plaintiff does not argue that the absence of such an interrogatory is a ground for a new trial, the jury instructions and verdict sheet are clearly interrelated, and Rule 51 applies to verdict sheets as well as jury instructions.[26] Even if the Court had instructed the jury on presumed damages, the verdict sheet, which specifically asked the jury only to award damages for actual harm,

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[22] 147 F.3d at 277-78.

[23] Id. at 278.

[24] Pl.'s Reply Mem. at 11.

[25] When the Court first distributed a draft of the verdict sheet, Plaintiff's counsel remarked, "Very clean, Judge, very clean." 3/19/04 N.T. at 7:6. After making two objections unrelated to damages, each of which were granted by the Court, Plaintiff's counsel reiterated his compliment: "Other than that, Judge, it's, as I said, it looks real clean." Id. at 9:1-2.

[26] See Neely v. Club Med Mgmt. Servs., Inc., 63 F.3d 166, 199-201 (3d Cir. 1995) (en banc) ("[W]here a defendant fails to object to the form and language of special verdict forms or to the jury charges, before closing arguments or at the close of charging before the jury retires to deliberations, and the form had been submitted to counsel, objections are waived.") (citing Fed. R. Civ. P. 51).

would have rendered such an instruction meaningless. Accordingly, by failing to raise an objection related to presumed damages at any point during the trial, Plaintiff waived any objection to the absence of a presumed damages instruction.

2. Plain Error

Despite Plaintiff's failure to object to the absence of a presumed damages instruction, a new trial may be warranted if the lack of such instruction was plain error.[27] The Court's "discretion to conduct a review under the plain error doctrine is limited to cases where the error is (1) fundamental and highly prejudicial or if the instructions are such that the jury is without adequate guidance on a fundamental question and (2) our failure to consider the error would result in a miscarriage of justice."[28] As such, review for plain error is "a form of discretionary review" that should be "exercised sparingly."[29]

Because the Supreme Court of Pennsylvania has not specifically addressed whether presumed damages are available under Pennsylvania law, we must predict how the Supreme Court of Pennsylvania would rule.[30] Plaintiff argues that Pennsylvania Suggested Standard Civil Jury Instructions ("PSSCJI") section 13.10B should be given in every case, as is stated in the Subcommittee Note accompanying that instruction. Section 13.10B provides as follows:

> If you find that the defendant acted either intentionally or recklessly in

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[27] Walters v. Mintec/Int'l, 758 F.2d 73, 76 (3d Cir. 1985) ("Notwithstanding a party's failure to raise its objection before the district court, an erroneous jury instruction may require a reversal if the error is plain or fundamental.") (citing Beardshall v. Minuteman Press Int'l, Inc., 664 F.2d 23 (3d Cir.1981)).

[28] Alexander v. Riga, 208 F.3d 419, 426-47 (3d Cir. 2000).

[29] Simmons v. City of Philadelphia, 947 F.2d 1042, 1078 (3d Cir 1991).

[30] Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 24 (3d Cir. 1986) ("If . . . the Pennsylvania Supreme Court has not articulated the law in this area, we must predict what rule it would apply."); Aetna Cas. & Sur. Co. v. Castagnola, No. Civ.A.88-4585, 1989 WL 49523, at *2 (E.D. Pa. May 9, 1989).

> publishing the false and defamatory communication, you may presume that the plaintiff suffered both injury to [his] [her] reputation and the emotional distress, mental anguish, and humiliation that would result from such a communication. This means you need not have proof that the plaintiff suffered emotional distress, mental anguish, and humiliation in order to award [him] [her] damages for such harm because such harm is presumed by the law when a defendant publishes a false and defamatory communication with the knowledge that it is false or in reckless disregard of whether it is true or false.
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> In determining the amount of an award for such presumed injury to the plaintiff's reputation and suffering of emotional distress, mental anguish, and humiliation by the plaintiff, you may consider the character and previous general standing and reputation of the plaintiff in [his] [her] community. You may also consider the character of the defamatory communication that the defendant published, its area of dissemination, and the extent and duration of the publication. [If the defendant made a public retraction or apology to the person or persons to whom the publication was made, that fact, together with the timeliness and adequacy of the retraction or apology, is important in determining the probable harm to the plaintiff's reputation.] [You may also take into account the defendant's unsuccessful assertion of the substantial truth of the defamatory communications as a matter likely to affect the plaintiff's reputation.] [You may also consider what probable effect the defendant's conduct had on the plaintiff's trade, business, or profession, and the harm that may have been sustained by the plaintiff as a result of that conduct.]

However, the Subcommittee Note appears to be at odds with the Pennsylvania Superior Court's decision in Walker v. Grand Central Sanitation, Inc., 634 A.2d 237, 244 (Pa. Super. Ct. 1993), holding that "a defendant who publishes a statement which can be considered slander per se is liable for the proven, actual harm the publication causes."[31] In so ruling, the Walker court cogently observed:

> Requiring the plaintiff to prove general damages in cases of slander per se

[31] The Walker court also rhetorically inquired: "[I]f a plaintiff in a slander per se case were not required to prove any damages whatsoever, why does a rule of Pennsylvania law provide that she need not prove 'special' damages? Why not hold that an alleged victim of a slander per se has no duty to plead 'damage' and leave it at that?" 634 A.2d at 244.

> accommodates the plaintiff's interest in recovering for damage to reputation without specifically identifying a pecuniary loss as well as the court's interest in maintaining some type of control over the amount a jury should be entitled to compensate an injured person. On one hand, a slander per se plaintiff is relieved of the burden to actually prove pecuniary loss as the result of the defamation; yet on the other hand, a jury will have some basis upon which to compensate her. Allowing the plaintiff to submit a claim for redress upon the presumption that she was damaged, especially in a case such as this, where the record is patently clear that no harm was suffered, requires the court to blindly follow a rule of law wthout regard to the reality of the situation presented. We cannot sanction, nor can we find that our Supreme Court has ever intended to sanction, such a rule.[32]

Although the Supreme Court of Pennsylvania denied allocatur in Walker,[33] numerous cases have cited Walker as authority for the position that defamation plaintiffs must prove actual harm.[34]

Plaintiff relies on Frisk v. News Co., 523 A.2d 347 (Pa. Super. Ct. 1986), where the

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[32] Id.

[33] 651 A.2d 539 (Pa. 1994) (Table).

[34] See, e.g., Pennoyer v. Marriott Hotel Servs., Inc., No. Civ.A.03-5060, 2004 WL 1468563, at *3 (E.D. Pa. June 29, 2004) ("Proof of general damages is required, since it accommodates the Court's interest in maintaining some type of control over the amount that a jury should be entitled to compensate an injured person."); Mediaworks, Inc. v. Lasky, No. Civ.A.99-1290, 1999 WL 695585, at *9 (E.D. Pa. Aug. 26, 1999) ("As the Superior Court held in Walker, a defendant who publishes a statement which can be considered defamation per se is only liable for the proven, actual harm the publication causes."); Synygy, Inc., 51 F. Supp. 2d at 582 (holding "that plaintiff must show general damages where the alleged defamation is per se"); SNA, Inc. v. Array, 51 F. Supp. 2d 554, 565 (E.D. Pa. 1999) ("[T]o recover based on the defamatory per se statements, Silva need not show pecuniary loss caused by them, but he must show general damages."), aff'd, Silva v. Karlsen, 259 F.3d 717 (3d Cir. 2001) (Table); Pyle v. Meritor Sav. Bank, Nos. Civ.A.92-7361, 92-7362, 1996 U.S. Dist. LEXIS 3042, at *11 (E.D. Pa. Mar. 13, 1996) ("In a defamation per se case, a plaintiff must prove general damages from a defamatory publication and cannot rely upon presumed damages. In other words, the plaintiff must prove actual harm to their reputation from the publication."); see also PPG Indus., Inc. v. Zurawin, 52 Fed. Appx. 570, 579 (3d Cir. 2002) ("Pennsylvania law requires a plaintiff in a defamation action to prove that the defendant's statements caused 'actual harm' to the plaintiff's reputation."); cf. Sprague v. Am. Bar Ass'n, 276 F. Supp. 2d 365, 374 (E.D. Pa. 2003) ("[B]ecause I have already decided that plaintiff has presented sufficient evidence of actual harm to survive summary judgment, it is unnecessary at this time for me to decide the presumed damages issue under Pennsylvania law. Given the current ambiguity of Pennsylvania law, plaintiff may wish to consider whether he wants to pursue presumed damages at trial thereby risking a later adverse decision on the issue.").

Plaintiff's counsel was himself a plaintiff in a recent case in which the Pennsylvania Court of Common Pleas applied Walker in such a way. Bochetto v. Gibson, No. 3722 Apr. Term 2000, 2002 WL 434551 (Com. Pl. Mar. 31. 2002), aff'd, 823 A.2d 1020 (Pa. Super. Ct. 2003); allow. of appeal granted on other grounds, 834 A.2d 1137 (Pa. 2003).

court, with little discussion, approved of an instruction that, according to the court,[35] mirrored PSSCJI § 13.10(B). This holding is directly at odds with Walker, which does not even cite to Frisk. Unlike Frisk, the Walker court spent a substantial portion of its opinion discussing the rationale behind presumed damages before concluding that the Supreme Court of Pennsylvania would likely adopt Section 621 of the Restatement (Second) of Torts and require proof of actual harm. Moreover, numerous courts have relied upon Walker's holding on presumed damages, whereas Frisk has been cited only three times for the proposition that presumed damages are available under Pennsylvania law, and presumed damages was not a major issue in any of those cases.[36]

Based upon its thorough review of the case law, the Court finds that the Walker court correctly predicted that the Supreme Court of Pennsylvania would adopt the Restatement's position

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[35] In Frisk, the court held that "the instruction provided by the court below mirrors, in all material respects, [PSSCJI 13.10(B)], and both are in complete accord with the Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)." 523 A.2d at 550. However, the Frisk court was incorrect. The instruction in Frisk stated, in relevant part:

> If you find the the [sic] Defendant acted either ***negligently*** or with reckless disregard in publishing a false and defamatory communication, you may presume that the Plaintiff suffered both injuries to his reputation and the emotional distress, mental anguish, and humiliation such as would result from such a communication.

Id. (emphasis added). In Gertz, however, the Supreme Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. Therefore, the Frisk court erred insofar as it approved of an instruction allowing a plaintiff to recover presumed damages upon a showing of negligence. Nevertheless, this error does not change the fact that the court did approve of PSSCJI § 13.10(B). But see Carpinet v. Mitchell, No. 1925 MDA 2001, 2004 Pa. Super. LEXIS 1304, at *17 (May 27, 2004) ("While it may seem harsh to fault the trial court for reliance on the suggested instruction, the fact that the charge was taken from the instruction is not dispositive of its legal propriety. Our supreme court 'has never adopted the Pennsylvania Standard Jury Instructions, which exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge.'") (citing Jeter v. Owens-Corning Fiberglas Corp., 716 A.2d 633, 636 (Pa. Super. Ct. 1998)).

[36] Two of these cases are from Courts of Common Pleas and carry no weight with this Court. McDermott v. Biddle, 25 Phila. Co. Rptr. 219 (1993); Godwin v. Daily Local News Co., 47 Pa. D. & C.3d 639 (1987). In the other case, the Third Circuit cited to Frisk in a footnote without any acknowledgment of Walker, stating, "[u]nder Pennsylvania law, where a defendant acts with actual malice, there is no need to prove actual damages." Beverly Enters., Inc. v. Trump, 182 F.3d 183, 188 n.2 (3d Cir. 1999). This statement is contradicted by the Third Circuit's more recent pronouncement in PPG Industries, Inc., supra, note 34.

that defamation plaintiffs must prove actual harm.[37] In addition, the Court finds PSSCJI § 13.10(B) particularly inapplicable in this case because Plaintiff is a corporation and thus cannot suffer emotional distress, mental anguish or humiliation.[38] Furthermore, even if presumed damages were available under Pennsylvania law, they would not be available to Plaintiff here because the evidence presented at trial fell well short of that necessary for a showing of actual malice or reckless disregard for the falsity as is constitutionally required for the recovery of presumed damages.[39] Therefore, presumed damages were not available to Plaintiff in this case. Accordingly, because Plaintiff was not entitled to such a jury instruction, the lack of such an instruction cannot be plain error.

B. The Omission of an Instruction on Defamation Per Se

Plaintiff contends that the Court erred by not instructing the jury on the issue of defamation per se. "Under Pennsylvania law, communications containing 'words imputing (1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct,' are considered defamatory per se."[40] When a statement is defamatory per se, a plaintiff can recover general damages (i.e., harm to reputation) and need not prove special damages (i.e., pecuniary loss).[41]

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[37] Cf. Neurotron, Inc. v. Med. Servs. Ass'n of Pennsylvania, 254 F.3d 444, 449 (3d Cir. 2001) ("[W]e would reach the same conclusion [as the court in Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 761 A.2d 553 (Pa. Super. Ct. 2000)] based on the respect the Pennsylvania Supreme Court has consistently accorded the Restatement (Second) of Torts even in situations in which Pennsylvania common law precedents varied from the Restatement rule.") (predicting that the Supreme Court of Pennsylvania would follow Sections 623A and 626 of the Restatement (Second) of Torts relating to the torts of injurious falsehood and trade libel).

[38] Cf. Carpinet, 2004 Pa. Super. LEXIS 1304, at *17 (ordering a new trial on damages even though the trial court's damages charge was derived from PSSCJI § 6.01I).

[39] See Gertz, 418 U.S. at 349.

[40] Mediaworks, Inc., 1999 WL 695585, at *7 (quoting Synygy, 51 F. Supp. 2d at 580).

[41] Id. ("[A]lthough a plaintiff need not prove actual pecuniary loss to recover for defamation per se, Plaintiff must show general damages: proof that one's reputation was actually affected by the defamatory statement, or that she suffered personal humiliation, or both, in order to be compensated.") (internal citation and quotation omitted); Walker, 634 A.2d at 247 ("[W]e can state firmly that a plaintiff who pleads and proves slander per se need not prove

"Whether the allegedly defamatory statements are defamatory per se is a question for the court."[42]

Plaintiff argues that the Court misled the jury by failing to specify that Franklin was not required to prove financial damages. This argument lacks merit. First, the premise of Plaintiff's argument–that the Court did not instruct the jury that it could compensate Plaintiff for reputation harm–is inaccurate. As Defendant argues, "the Court gave the gist of [P]laintiff's proposed instruction to the jurors."[43] Plaintiff proposed the following instruction on defamation per se:

> Because of the particular negative and derogatory character of some defamatory communications, the law categorizes them as defamatory per se, and in such situations, the plaintiff does not have to show that the defamation caused it economic or financial harm. Thus, in cases involving defamation per se, the plaintiff does not need to show actual economic losses, but only needs to prove actual harm to its reputation, and even then, such reputation damages may be presumed if the plaintiff proves the defendant acted intentionally or recklessly. I will explain the concept of presumed damages later.
>
> Where the defamatory communication imputes to the plaintiff conduct, characteristics, or a condition that would adversely affect it in its lawful business or trade, the law deems the communication defamatory per se. It is also defamatory per se to allege one is guilty of criminal conduct.
>
> If you find the defamatory communication in this case falls into any one of these categories, plaintiff does not have a burden to prove economic losses as a result of the defamatory communication.[44]

By comparison, the Court's actual instruction included the following charges: 1) "actual injury can include **impairment of reputation**"; 2) "Plaintiff is entitled to be fairly and

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special damages in order to recover.").

[42] Mediaworks, Inc., 1999 WL 695585, at *7 (citing Synygy, 51 F. Supp. 2d at 580); Fox v. Kahn, 221 A.2d 181, 184 (Pa. 1966) ("The question of whether the language was actionable Per se is in the first instance a matter of law for the Court.").

[43] Def.'s Mem. in Opp. at 19-20.

[44] Pl.'s Prop. Jury Instr. at 10.

adequately compensated for **all** harm it suffered as a result of the false and defamatory communication published by the defendant"; and 3) "the injuries for which you may compensate the plaintiff by an award of damages against the defendant include **the actual harm to the plaintiff's reputation** that you find resulted from the defendant's conduct and any other injuries that you find the plaintiff suffered as a result of defendant's act."[45] If anything, the Court's instruction was more beneficial to Plaintiff than Plaintiff's proposed instruction because it instructs the jury to award damages for reputational harm without first requiring that the jury find defamation per se. In essence, the only difference between the Court's instruction and Plaintiff's proposed instruction is that the Court instructed the jury as to what it could compensate Plaintiff for, including reputational harm, whereas Plaintiff's instruction specified what the jury did not have to find, specifically, economic harm. That a jury instruction is worded differently from a party's proposed instruction does not entitle Plaintiff to a new trial.

In addition, Plaintiff simply did not present any evidence that would allow a jury to conclude that it was harmed.[46] Plaintiff did not present the testimony of one doctor or potential customer who had even read the article, let alone read it and formed a negative opinion of Franklin as a result. Moreover, in the months and years following the publication of the article, Plaintiff's sales increased at a rate comparable to the sales increases prior to the publication of the article. This Court fails to see how any reasonable jury could find that an article that was not read by any potential customers caused any harm, reputational or otherwise, to a company whose revenues increased in

[45] 3/22/04 N.T. at 25:8-27:7 (emphasis added). This instruction is quoted in its entirety supra, section II.

[46] Prior to trial, in connection with Defendant's Motion in Limine to preclude Plaintiff's damages evidence, Plaintiff maintained that it had suffered reputational harm and would be able to prove as much at trial. Accordingly, the Court denied Defendant's Motion, giving Plaintiff the opportunity to present its evidence of reputational harm to a jury.

the months and years following the publication of the article. Thus, the reason the jury did not find any reputational harm was not because it was misled by the Court's damage instruction, but because Plaintiff did not present any evidence of reputational harm. Accordingly, even if Plaintiff was entitled to its proposed instruction on defamation per se, the lack of such an instruction did not harm Plaintiff.

IV. CONCLUSION

For the foregoing reasons, the Court's jury instructions were proper, and Plaintiff is not entitled to a new trial or partial new trial.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANKLIN PRESCRIPTIONS, INC.,	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 01-145**
v.	:	
	:	
THE NEW YORK TIMES CO.,	:	
Defendant	:	

ORDER

AND NOW, this 5th day of August, 2004, upon consideration of Plaintiff Franklin Prescription, Inc.'s Motion for A Partial New Trial, or in the Alternative, for a Complete New Trial [Doc. #100], Defendant The New York Times Company's Memorandum in Opposition thereto [Doc. #104], Plaintiff's Motion for Leave to File a Reply Memorandum and the Reply Memorandum attached thereto [Doc. #114], and Defendant's Memorandum in Response [Doc. #115], it is hereby **ORDERED** as follows:

1. Plaintiff's Motion for Leave to File a Reply Memorandum [Doc. #114] is **GRANTED**;

2. Plaintiff's Motion for a Partial New Trial, or in the Alternative, for a Complete New Trial [Doc. #100] is **DENIED**; and

3. This case shall remain **CLOSED** for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

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CYNTHIA M. RUFE, J.